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No. 81-2316

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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THE BOARD OF EDUCATION OF THE NORTH LITTLE ROCK, ARKANSAS, SCHOOL DISTRICT, et al.,

Petitioners,

v.

ROBERT J. DAVIS and LORENE JOSHUA,

Respondents.

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On Petition for a Writ of Certiorari to The United States Court of Appeals For The Eighth Circuit

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BRIEF IN OPPOSITION

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STATEMENT

The Current Proceedings

The most recent proceedings in this school desegregation case involving the public schools of North Little Rock,

Arkansas were initiated by the school board's motion to revise the court approved desegregation plan to enable the board to close one of its schools. Over respondents' objections, both courts below upheld the board's right to make the requested changes on the merits, while rejecting the board's arguments that respondent had no standing to contest the modification of the court approved desegregation plan and that unitary status had been achieved when the desegregation plan was initially implemented in 1972. Respondent has not sought review of the unfavorable decision below.

Thus the case presents the anomalous situation of a school board, the successful party below, seeking review of a decision which ruled in the board's favor on the merits.

The petition presently before this Court stems from a motion filed on May 22, 1981 by the board seeking approval of a plan to close a district-wide seventh grade center at formerly black Central Junior High School. Plaintiff-intervenor Lorene Joshua unsuccessfully opposed this motion on the grounds that the proposed closing would impose disproportionate transportation burdens on black students and continue an illegal policy of discriminatorily closing educational facilities in black areas. The board also reiterated arguments made previously that Mrs. Joshua[1/] lacked standing to contest the closing of the seventh

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1/ The action was originally filed by Cornell Graves as a class action pursuant to Fed. R. Civ. P. 23(a) and (b)(2). Although a class has never formally been certified the courts below have treated this litigation as a class action. The district court and the court of appeals have permitted liberal substitution of plaintiffs. Cf. Rogers v. Paul, 382 U.S. 198 (1965). On

grade center because none of her children attended that grade in 1981 and that unitary status in effect had been achieved long ago so that judicial supervision was unnecessary. The district court found it sufficient that she currently had three children in the school system, in the second, fifth and tenth grades. Continuing jurisdiction was found. Plaintiff-intervenor Joshua appealed the closing of the center.

The Court of Appeals affirmed. The court also stated that it clear that plaintiff had standing "with regard to the entire desegregation suit" and that there

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1/ continued

April 22, 1977, the district court allowed Lorene Joshua, as mother and next friend of four children enrolled in the North Little Rock public schools, to be substituted for Robert J. Davis, who had moved away from North Little Rock. Davis had succeeded Graves, whose children had earlier graduated from the system.

was no need for pupils in each grade level to be plaintiffs. The court found that a case or controversy sufficient to satisfy the Article III requirement continued to exist until the district court determined that a unitary system of education had been achieved in compliance with the prior court orders.

The Prior History of the Case

The board filed a petition for certiorari raising the same questions in 1981, No. 80-1831, and this Court denied it on October 13, 1981. 50 U.S.L.W. 3272. Because the case involves an effort to relitigate matters previously decided in earlier proceedings we set forth below a brief history of the case.

This desegregation action was initiated in 1968 by black students and their parents. In 1969 the district court

enjoined the board from further maintaining its unconstitutional dual school system and ordered relief. Graves v. Board of Education of North Little Rock, Arkansas, School District, 299 F. Supp. 843 (E.D. Ark. 1969).[2/] In 1971, the Eighth Circuit ordered implementation during the 1972-73 school year of a plan which would desegregate schools, faculty and staff. Davis v. Board of Education of North Little

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2/ This litigation has produced five reported opinions in the district court, three in the court of appeals, and one denial of a petition for certiorari in this Court: Graves v. Board of Education of North Little Rock, Arkansas, School District, 299 F. Supp. 843 (E.D. Ark. 1969); 302 F. Supp. 136 (E.D. Ark. 1969); Davis v. Board of Education of North Little Rock, Arkansas, School District, 328 F. Supp. 1197 (E.D. Ark. 1971); 449 F.2d 500 (8th Cir. 1971) (en banc); 362 F. Supp. 730 (E.D. Ark. 1973); 635 F.2d 730 (8th Cir. 1980), cert. denied, 50 U.S.L.W. 3272 (1981) (Rhenquist, J. dissenting); 520 F. Supp. 108 (E.D. Ark. 1981); 674 F.2d 684 (8th Cir. 1982).

Rock, 449 F.2d 500 (8th Cir. 1971) (en banc). The district court retained jurisdiction.

On April 30, 1975 plaintiffs moved for further relief, seeking, inter alia, further faculty and staff desegregation and a reduction in the burden of transportation imposed upon black students. The district court ruled in favor of plaintiffs on September 13, 1977 after permitting Mrs. Joshua's intervention, but the presiding judge died before ruling on motions by the board to vacate all prior decrees and orders of the district court on jurisdictional grounds. The district court eventually denied the Board's motions on June 29, 1979. On appeal, the Eighth Circuit affirmed the district court's decision without dissent. Davis v. Board of Education of North Little Rock, Arkansas, 635 F.2d 730 (1980).

With regard to faculty and staff, the Court of Appeals upheld the district court's finding that the school district had not eradicated all vestiges of discrimination and that "[m]ore remains to be accomplished before it can be said that the North Little Rock School District is fully integrated." 635 F.2d at 733. The court also found that "the record is replete with evidence of racial disparities" in extracurricular activities and disciplinary suspensions, which "can be dramatically improved if this Court's earlier mandate, requiring a nonracially identifiable faculty and staff at every level of the school system is promptly implemented." 635 F.2d at 733. The court remanded the case to the district court with orders to "retain jurisdiction until such time as the North Little Rock School District is thoroughly integrated." Id.

The board's petition for certiorari to this Court, which raised the same questions as the board seeks to present by its present petition, was denied. Board of Education of North Little Rock, Arkansas, School District v. Davis, 50 U.S.L.W. 3272 (1981) (Rhenquist, J., dissenting).

REASONS TO DENY THE WRIT

1. Last term, this Court denied certiorari to review the same questions presented in the instant petition.[3/] The

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3/ The questions presented in the petition in 80-1831 were:

(1) Does Constitution vest district court with jurisdiction to continue its supervision of a school district's continued operations, including imposition of mandatory cross-district busing and manipulation of school assignments to achieve racial balance where district has operated court-approved racially unitary school system since 1972?

record reveals that since then the board has presented no new factual evidence in support of its contentions or attempted to show material change of circumstances: the record on the failure to achieve unitary status in 1972 and Mrs. Joshua's standing is exactly the same as when this case was last before the Court. Below, the board merely reargued questions previously and conclusively decided against it by the two lower courts. Nor does the instant petition make any argument in behalf of review not previously made in the previous petition.

3/ continued

(2) Is district court at liberty to treat suit filed in 1968 but never certified under Fed. R. Civ. P. 23 as class action in order to sustain its continued supervision of operation of school district and to summarily substitute new nominal plaintiffs from time to time to perpetuate its jurisdiction in response to claim of mootness for lack of any plaintiff with stake in its outcome?

Thus, there simply is no reason for the Court to reconsider its prior denial of the writ.

2. Petitioner was the prevailing party below on the matters actually litigated and seeks no change in the results obtained below as to those matters. Petitioner seeks only a change in the legal theory of the decisions below in order to affect the disposition of matters other than those actually considered by the courts below.

3. With respect to the merits of the ruling of the two courts below on the achievement of unitary statute and standing, we refer the Court to the brief in opposition filed in No. 80-1831. However, we note that there was no abuse of equitable discretion by the courts below in ruling that the board has failed to attain unitary status. The board has not sought

an evidentiary hearing much less demonstrated that mere initial implementation of the desegregation plan in the 1972-73 school year resulted in a full transition to a racially nondiscriminatory school system. The rule is that the efficacy of a desegregation remedy must be proved in practice.[4/] As late as 1980, the Court of Appeals, referring specifically to faculty and staff segregation and utilization of facilities, stated that "[m]ore remains to be accomplished before it can be said that the North Little Rock School District is fully integrated." 635 F.2d at 733.[5/]

4/ E.g., Raney v. Board of Education, 391 U.S. 443, 449 (1968); Green v. School Board of New Kent County, 391 U.S. 430, 439 (1968); see also United States v. Texas Education Agency, 647 F.2d 504, 508-09 (5th Cir. 1981).

5/ The Court has repeatedly ruled that faculty and staff assignment and utilization of facilities present issues which

In its most recent opinion, the Eighth Circuit expressly recognized the need for the court's "continuing jurisdiction over desegregation" and that "[t]his case should not be dismissed and a case or controversy sufficient to satisfy Article III will exist until such time as the district court determines that a unitary system of education has been achieved and the North Little Rock School District is thoroughly integrated." 674 F.2d at 689.[6/]

5/ continued

properly fall within the scope of a desegregation case. Columbus Board of Education v. Penick, 443 U.S. 449, 460 (1979); Keyes v. School District No. 1, 413 U.S. 189, 200 (1973); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 18 (1971).

6/ Absent an evidentiary hearing on the attainment of unitary status, the established practice is that the district court should maintain jurisdiction of a school

As to standing, it has long been the rule that each individual minority student has a right to attend fully nondiscriminatory schools and standing to challenge particular aspects of a racially segregated school system. E.g., Rogers v. Paul, 382 U.S. 198, 200 (1965); Flax v. Potts, 313 F.2d 284, 288-89 (5th Cir. 1963). Petitioner relies on Pasadena City Board of Education v. Spangler, 427 U.S. 424, 429-30 (1976). In that case, plaintiffs had graduated from the school system and only the intervention of the United States kept the litigation from becoming moot. The instant case is distinguishable

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6/ continued

desegregation case. E.g., Lee v. Macon County Board of Education, 584 F.2d 78, 81 (5th Cir. 1978); United States v. State of Texas, 509 F.2d 192, 193 (5th Cir. 1975); Youngblood v. Board of Public Instruction, 448 F.2d 770 (5th Cir. 1971).

from Pasadena in that the district court allowed Mrs. Joshua, a plaintiff-intervenor with a live interest in the controversy, to intervene over five years ago.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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